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In The
# Supreme Court of the United States

JOHN CUNNINGHAM,

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

**On Writ Of Certiorari To The Court Of Appeal Of California, First Appellate District**

## BRIEF OF HAWAII, ARKANSAS, COLORADO, ILLINOIS, MONTANA, NEVADA, OREGON, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICI CURIAE

Few issues are more important to State governments than the proper functioning of their criminal justice systems. A fundamental component of criminal justice is, of course, the punishments imposed on convicted offenders. As can be expected in our federal system, the States have adopted varying approaches to sentencing, some utilizing formal guidelines similar to the Federal Sentencing Guidelines, others retaining traditional discretionary regimes, still others adopting hybrid systems. The amici States are representative of this diversity, and none has a sentencing system identical to California's. Nevertheless, the amici join together in filing this brief in support of California based on their shared interest in ensuring that the limits imposed by *United States v. Booker*, 543 U.S. 220, 225-44 (2005) (opinion in part for the Court by Justice Stevens), and *Blakely v. Washington*, 542 U.S. 296 (2004), are not unduly expanded. Even after *Booker* and *Blakely*, States can provide some structure to help ensure that their judges exercise reasonable discretion in imposing sentences. California has done precisely that, and its sentencing statute should be upheld by this Court.

## STATEMENT OF THE CASE

1. Prior to 1977, most California offenders were sentenced to an indeterminate term, typically one year to life. "A sentence to an indeterminate term was in effect, deemed a sentence for the maximum statutory term, subject to parole by the Adult Authority . . . , which agency was constitutionally compelled to fix a term within the statutory range that was proportionate to the offense." *In re Jeanice D.*, 617 P.2d 1087, 1094 (Cal. 1980). In 1977, the

California Legislature enacted its Determinate Sentencing Law, which "repealed the provisions governing the fixing of terms by the Adult Authority . . . , substituting 'determinate terms' for substantially all offenses which formerly had carried indeterminate terms and which had not been reduced to misdemeanors." *Id.* The new sentencing system sought to ensure punishment "proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." Cal. Penal Code §1170(a)(1). The Legislature further determined that those objectives "can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offenses . . . to be imposed by the court with specified discretion." *Id.*

For most offenses, the statute specifies three terms of imprisonment, labeled the lower, middle, and upper terms. The statute contemplates two basic ways by which an offender can receive a sentence other than the middle term. First, the sentence could be *enhanced*

> on the basis of statutory enhancements reflecting the defendant's criminal history or particular circumstances of the crime, including, for example, the use of a firearm or other dangerous weapon, infliction of great bodily injury on the victim, the particular vulnerability of the victim . . . , commission of the crime while released pending trial, the amount of property loss, and the quantity of drugs involved.

*People v. Black*, 113 P.3d 534, 537 (Cal. 2005) (*citing* Cal. Penal Code §§667.5, 667.9, 667.10, 12022.1, 12022.5-.55, 12022.6, 12022.7, 12022.8, 12022.75, 12022.9; Cal. Health & Safety Code §11370.4). These enhancements must be set forth in the indictment and proved to the jury beyond a

reasonable doubt unless the defendant waives that right. Cal. Penal Code §1170(e).

Second, the judge can impose the upper or lower terms (plus any enhancement) if the judge finds that aggravating circumstances outweigh the mitigating circumstances or vice versa. *Id.* §1170(b); Cal. Rules of Court, Rule ("Cal. Rule") 4.420(b). The California rules provide that "[c]ircumstances in aggravation include" a list of eleven "[f]acts relating to the crime" (such as the defendant's role in the crime and the manner in which it was carried out) and a list of five "[f]acts relating to the defendant" (such as the defendant's criminal record and past performance on probation or parole). Cal. Rule 4.421. In addition, Rule 4.408(a) authorizes judges to consider any "additional criteria reasonably related to the decision being made." The only limits on what circumstances can count as aggravating for these purposes are that, in imposing the upper term, the judge may not rely on a fact that is an element of the crime, or a fact that is serving to enhance the crime unless the court strikes the enhancement. Cal. Rule 4.420(c), (d).

The mitigating factors the judge may consider are equally broad, covering a similar list of "[f]acts relating to the crime" and "[f]acts relating to the defendant," as well as "additional criteria reasonably related to the decision being made." Cal. Rule 4.423, 4.408. A judge who selects an upper or lower term must state his reasons "orally on the record" and provide "a concise statement of the" aggravating and mitigating factors he found. Cal. Rule 4.420(e).

2. Petitioner was convicted by a jury of the continuous sexual abuse of a child in violation of California Penal

Code §288.5. Pursuant to the statute, this crime "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." *Id.* The trial court sentenced Petitioner to the upper 16-year term, explaining that (1) the crime involved great violence and the threat of great bodily harm; (2) the victim was particularly vulnerable due to his age and dependence on Petitioner as his father and primary caretaker; (3) Petitioner threatened to commit bodily injury in an attempt to coerce the victim to recant his statements about the crime; (4) Petitioner took advantage of a position of trust to commit the crime; (5) Petitioner is a serious danger to the community; and (6) Petitioner was a peace officer at the time he committed the criminal acts, violating his duty to serve the community. J.A. 22-23. The California Court of Appeal affirmed the sentence, rejecting Petitioner's contention that it was imposed in violation of *Blakely*. Pet. App. A 16-17.

3. Two months after the Court of Appeal's decision in this case, the California Supreme Court decided *People v. Black*, *supra*, which definitively construed the State's sentencing provisions and upheld them against a *Blakely* challenge. The court reasoned that "in operation and effect, the provisions of the California determinate sentencing law simply authorize a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." 113 P.3d at 543.

In support of that conclusion, the court stated that "the requirement that an aggravating factor exist" before an upper term may be imposed "is merely a requirement that the decision to impose the upper term be *reasonable*." *Id.* at 544 (emphasis in original). As such, it is akin to a

traditional discretionary sentencing system: the "Legislature did not identify all of the particular facts that could justify the upper term. Instead, it afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence." *Id.*

The California Supreme Court found that this feature of the California sentencing system makes it akin to the federal system after *Booker*. "*Booker* makes clear that the concept of a discretionary sentencing system is not limited to those decisions that involve complete, unguided, and unreviewable discretion. . . . After *Booker*, a federal judge, while not bound to apply the guidelines, must consult those guidelines and take them into account when sentencing." *Black*, 113 P.3d at 547. The court concluded that "the [California] determinate sentencing law's requirement that an upper term sentence be imposed only if an aggravating factor exists is comparable to *Booker*'s requirement that a federal judge's sentencing decision be not unreasonable." *Id.* at 548.

## SUMMARY OF ARGUMENT

The line of decisions beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not bar all judicial factfinding that might have the effect of increasing the sentence a defendant receives. The Court has drawn a sharp dichotomy between judicial factfinding undertaken in indeterminate sentencing systems and judicial factfinding undertaken in determinate systems. The former is permitted, even where the judge imposes a sentence at or near the statutory maximum based on facts only he found.

The central issue in this case is whether California's sentencing regime, as construed by the California Supreme Court, is properly characterized as determinate or indeterminate. A comparison of the California system with the federal system as modified in *Booker* confirms that it is best characterized as indeterminate.

1. The remedial opinion in *Booker* did not give federal district courts untethered discretion to impose sentences anywhere within the statutory range. To the contrary, the Court required district courts to consult the Guidelines and to consider factors set forth in 18 U.S.C. §3553(a) when exercising their sentencing discretion. The Court also subjected district court sentencing decisions to appellate review for "reasonableness" based on the §3553(a) factors. The post-*Booker* sentencing system is, therefore, a hybrid, neither binding district courts to mandatory guidelines nor granting them the untethered discretion they had prior to the Federal Sentencing Act.

Notwithstanding the constraints still imposed on district courts, no Justice in *Booker* suggested that the modified federal sentencing system is unconstitutional. Put another way, no Justice disputed that, notwithstanding those constraints, the modified federal sentencing system is an indeterminate system. A defendant who commits a federal crime does not have a legal *right* to a sentence within the Guidelines range and is not *entitled* to a sentence below the statutory maximum merely because the jury did not find facts that might form the basis of an upward departure. At bottom, the post-*Booker* federal sentencing system allows district courts to exercise reasoned judgment, which is precisely the task of judges in any indeterminate system.

2. The California sentencing system likewise authorizes judges to exercise broad discretion, constrained by a reasonableness requirement. It is true that the California statute authorizes a judge to impose an upper term only if the judge finds facts that convince him that aggravating circumstances outweigh the mitigating circumstances. Cal. Penal Code §1170(b). But the California Supreme Court construed that provision as "merely a requirement that the decision to impose the upper term be *reasonable*," *Black*, 113 P.3d at 544. By contrast, the Washington Supreme Court never construed the Washington statute at issue in *Blakely* in that manner. By reading the California sentencing law as it did, the California Supreme Court read the statute as creating an indeterminate system under which judges exercise "the traditional broad range of discretion." *Id.*

It matters not that a California judge's discretion is cabined by a reasonableness requirement, that imposition of the middle term will typically be considered reasonable, or that a judge's reasons for sentencing a defendant at the top of the sentencing range must be stated on the record. Precisely the same is true in the post-*Booker* federal system. Accordingly, as in the federal system, a defendant who commits a California crime does not have a legal *right* to a middle-term sentence and is not *entitled* to a sentence below the upper term merely because the jury did not find facts that might form the basis of an upward departure. The broad discretion the California system vests in sentencing judges forecloses that result. Like the post-*Booker* federal system, the California sentencing systems directs sentencing judges to exercise reasoned judgment in selecting, within the full statutory range, the appropriate sentence. Both systems are indeterminate.

3. Petitioner and his amici assert that ruling against California would be inconsequential because California – and, presumably, other States – can easily "*Blakely*-ize" or "*Booker*-ize" their systems. Neither suggestion has merit. Although a *Blakely*, jury-factfinding system has advantages that commend itself to many States, the approach also has the drawbacks noted in the *Blakely* dissents. In the end, the policy decision whether to *Blakely*-ize a sentencing system involves complex tradeoffs, the outcome of which will vary from State to State. Our federal system is premised on the recognition that different States, reflecting the wills and interests of their different constituencies, will choose different policies. It is not for amicus NACDL to decide that every State must *Blakely*-ize its system. Nor is it necessary, as petitioner suggests, for the California Legislature to *Booker*-ize the California sentencing system. As construed by the California Supreme Court, the California system operates in essentially the same way as *Booker*-ized systems. There is no need for a legislative fix.

## ARGUMENT

**The California Sentencing System, Like The Federal Sentencing System After *United States v. Booker*, Allows Judges To Impose The Maximum Statutory Sentence In The Exercise Of Their Reasoned Discretion, And Therefore Does Not Violate The Sixth Amendment.**

Although the California sentencing system does not give sentencing judges untethered discretion to impose sentences anywhere between the statutory minimums and maximums, neither does the post-*Booker* federal system.

Both systems impose certain substantive and procedural constraints on sentencing judges' power to sentence at or near the upper range. Yet, more importantly, both empower sentencing judges to exercise their reasoned discretion in determining where, within the full statutory range, defendants should be sentenced. Judicial discretion of that sort is the hallmark of indeterminate sentencing schemes and is the reason the California sentencing system, like the federal system, comports with *Blakely* and satisfies the Sixth Amendment.[1]

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[1] Traditionally, the term "indeterminate" referred to systems that use discretionary parole release; the term "determinate" referred to systems that do not. Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 Emory L. Rev. 377, 382-83 (2005). As Professor Bibas has observed, however, "[i]n more modern parlance, indeterminate sentencing allows judges to set sentences anywhere below the statutory maxima (for example, anywhere from zero to twenty years for armed robbery). Determinate sentencing, in contrast, uses sentencing guidelines or statutes (such as mandatory minima) to guide or constrain judicial discretion within the statutory ranges." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2468 n.12 (2004). This explains why it is perfectly reasonable to construe a system titled "Determinate Sentencing Law" as indeterminate. In 1977, California switched its system from "indeterminate" to "determinate," as those terms were traditionally understood, *i.e.*, California no longer authorized a parole board to determine the release date. Those traditional terms do not speak to whether the system is determinate or indeterminate in "modern parlance." See Chanenson, *supra*, at 384 (explaining that a "determinate" system, as the term was traditionally understood, "may be discretionary or nondiscretionary. A discretionary, determinate system allows a judge to pick the actual sentence . . . from a statutory range of punishments.").

## I. *Booker* held that the Constitution permits judges to base sentences on facts they find if the judges are reasonably exercising their discretion, guided by statutorily-specified considerations.

### A. *Booker* changed the federal sentencing system from a determinate system to a quasi-indeterminate system.

The parties in this case have exhaustively rehearsed this Court's opinions in *Apprendi*, *Blakely*, and *Booker*, and we will not do so again. For present purposes, a few aspects of those decisions bear highlighting.

Starting with *Apprendi* and continuing through *Booker*, this Court has reaffirmed that *Williams v. New York*, 337 U.S. 241, 246 (1949), remains good law, and that judges operating in indeterminate sentencing systems may exercise their discretion by imposing the statutory maximum sentence based on facts found solely by them. See *Apprendi*, 530 U.S. at 481; *Harris v. United States*, 536 U.S. 545, 558 (2002); *Blakely*, 542 U.S. at 308-09; *Booker*, 543 U.S. at 233. In *Williams*, the Court expressly approved the practice of judges basing their sentences on facts not put before the jury, including "[o]ut-of-court affidavits," judges' personal "knowledge of the personalities and backgrounds of convicted offenders," and "information concerning every aspect of a defendant's life" set forth in probation reports. 337 U.S. at 246, 250. The Court found that this information was not presented at trial for "sound practical reasons," *id.* at 246, and that "most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information was restricted to that given in open court by witnesses subject to cross examination." *Id.* at 250.

In *Booker*, the Court addressed the interplay between *Williams*' approval of judicial factfinding, *Blakely*, and the Federal Sentencing Guidelines:

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. See *Apprendi*, 530 U.S., at 481; *Williams* v. *New York*, 337 U.S. 241, 246 (1949). Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges; . . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

543 U.S. at 233 (opinion in part for the Court by Justice Stevens). The remedial majority, of course, took up that suggestion and severed 18 U.S.C. §3553(b)(1) from the Sentencing Reform Act, thereby making the Guidelines advisory. *Id.* at 244-71 (opinion in part for the Court by Justice Breyer).

Critically, the remedial opinion in *Booker* did not revert federal sentencing to its pre-Sentencing Guidelines state. Prior to the Guidelines, federal district court judges exercised virtually unreviewable discretion when meting out sentences. See *Dorszynski v. United States*, 418 U.S. 424, 443 (1974) ("Well-established doctrine bars [appellate] review of the exercise of sentencing discretion."), quoted in *Booker*, 543 U.S. at 307 (Scalia, J., dissenting in part). Adopting that approach, however, would have undermined Congress' desire to "provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding

unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted." 543 U.S. at 264 (quoting 28 U.S.C. §991(b)(1)(B)). The Court therefore required district courts to "consult the Guidelines" and to consider the factors set forth in 18 U.S.C. §3553(a) when exercising their sentencing discretion. 543 U.S. at 264.

In addition, the Court severed the "appeals-related section" of the Sentencing Reform Act, 18 U.S.C. §3742(e), and held that appellate courts will instead review federal sentences for "reasonableness," based on the considerations set forth in §3553(a). 543 U.S. at 260-62. Such review is a "complex and nuanced [task], . . . requiring [the court] to consider the extent to which the sentence imposed by the district court comports with the various, and sometimes competing, goals of [the federal guidelines]." *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006). This is a far cry from pre-Guidelines practice under which, as noted, appellate review of the trial judges' exercise of sentencing discretion was barred.[2]

The post-*Booker* federal system also differs from pre-Guidelines practice in requiring sentencing judges to state on the record the reasons for the sentences they impose,

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[2] See Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law At Cross-Purposes*, 105 Colum. L. Rev. 1082, 1114 n.120 (2005) ("Justice Breyer's remedial opinion in *Booker* envisions a unique model of advisory guidelines, which will coexist with some form of appellate sentence review. No state system has ever conjoined meaningful sentence review with voluntary guidelines, so the Court's experiment takes the federal system into uncharted waters."). This article was published several months before the California Supreme Court issued its opinion in *Black*.

particularly sentences that vary from the standard Guidelines range. As the Fifth Circuit has stated:

> when the judge elects to give a non-Guideline sentence, she should carefully articulate the reasons she concludes that the sentence she has selected is appropriate for that defendant. These reasons should be fact specific and include, for example, aggravating or mitigating circumstances relating to personal characteristics of the defendant, his offense conduct, his criminal history, relevant conduct or other facts specific to the case at hand which led the court to conclude that the sentence imposed was fair and reasonable.

*United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005) (footnote omitted). "Such reasons are essential to permit [the appeals] court to review the sentence for reasonableness as directed by *Booker*." *Id.*

The post-*Booker* federal sentencing system is therefore a hybrid. Although district courts are not bound by mandatory guidelines, neither do they have the sort of untethered discretion this Court blessed in *Williams*. This can be seen in appellate decisions since *Booker*. In contrast to the pre-Guidelines regime, appellate courts have not hesitated to reverse sentences found to be unreasonable, typically when district courts imposed sentences below or above the Guidelines range. See United States Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* (March 2006) ("*Final Report*"), at 30 (listing seventeen such decisions, as well as four decisions reversing sentences and remanding for further explanation). For these reasons, the post-*Booker*

federal sentencing system might best be described as quasi-indeterminate.

### B. The quasi-indeterminate sentencing system established in *Booker* comports with *Blakely*.

Although the Court was deeply divided as to whether the *Booker* remedy faithfully effectuated Congress's intent, there was no dispute that the modified federal sentencing system is constitutional. The passage from Justice Stevens' opinion for the Court quoted earlier explains why that is so: "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Booker*, 543 U.S. at 233; see also *Harris*, 536 U.S. at 549 ("After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed.") Yet, as just explained, the post-*Booker* federal sentencing system is not a true indeterminate regime. *Booker* therefore stands for the proposition that judicial fact-finding is not only permissible in purely indeterminate schemes, it is also permissible in hybrid schemes under which judges exercise guided discretion subject to review for reasonableness.

Because that holding has major implications for this case, it merits further elaboration. Why are judges permitted to find facts in indeterminate sentencing systems, but not in mandatory guideline systems? In *Blakely*, the Court tackled this issue head on:

> Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board)

> may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence – and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence – and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

542 U.S. at 309. To truly understand why the post-*Booker* federal system satisfies *Blakely*, one needs to apply the above analysis to it.

Let's assume the following facts. A defendant is convicted under 18 U.S.C. §2423(b) of traveling in interstate commerce to engage in a sexual act with a juvenile. Although the statutory maximum for the offense is 30 years (360 months) imprisonment, the advisory Guidelines range (after all adjustments are made) is 100 to 120 months. The federal district court then sentences the defendant to 200 months imprisonment based on the court's (not the jury's) findings that (1) the victim suffered severe psychological injuries, (2) the defendant inflicted gratuitous injury, and (3) the defendant was a member of a violent street gang. See United States Sentencing Guideline §§5K2.3, 5K2.8, 5K2.18.

Although it is possible to argue that (to quote *Blakely*) the defendant had the legal *right* to the lesser sentence of 100 to 120 months, *Booker* implicitly – but undeniably –

rejects that view. The defendant in our example is not *entitled* to a maximum sentence of 120 months merely because the jury did not find the facts that formed the basis for the judge's upward departure. As in a pure indeterminate scheme, the defendant is understood as knowing that he is risking a sentence of 200 (or 360) months in jail for the offense. Although he might have received a lesser sentence had he inflicted less injury, this does not give the sexual predator who inflicts less injury an entitlement to the lesser sentence. The system vests enough discretion in the sentencing judge to foreclose that result.

As Professor Berman has explained, after *Booker*, "finding facts that have a fixed and predictable sentencing consequence is always a task for juries; considering facts in service to the exercise of reasoned judgment at sentencing is a task that can still be done by judges." Douglas A. Berman, *Conceptualizing Booker*, 38 Ariz. St. L. J. ___ (2006) (forthcoming). Although district court judges still operate under some constraints, they are best understood as exercising "reasoned judgment," just as the less-constrained judges at the time of *Williams* were.

## II. In all relevant respects, the California sentencing system operates in the same manner as the post-*Booker* federal sentencing system.

The California sentencing law is not an intricate guidelines scheme, with base offense levels, "specific offense characteristics" leading to offense-level "adjustments," further adjustments based on cooperation and prior criminal history, and then the assessment of whether an upward or downward departure is warranted. Nevertheless, the key attributes of the post-*Booker* federal

sentencing system are present in the California system. Both can best be described as quasi-indeterminate schemes under which judges exercise broad discretion that is nonetheless restrained by a reasonableness requirement. Just as the post-*Booker* federal sentencing system is constitutional, so too is the California system.

### A. The California sentencing system, like the post-*Booker* federal sentencing system, is quasi-indeterminate.

Petitioner's core argument is that in California the "'statutory maximum' for *Blakely* and *Apprendi* purposes" is the middle term because that "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury's verdict or admitted by the defendant." Pet. Br. 18. That analysis fails to give appropriate weight to the California Supreme Court's construction of the statute. Although California law denotes the middle term as the presumptive sentence, that designation is not a barrier to the sentencing judge's imposition of whatever he reasonably concludes is a just sentence. "[T]he requirement that an aggravating factor exist" in order to sentence a defendant to the upper term "is merely a requirement that the decision to impose the upper term be *reasonable*." *Black*, 113 P.3d at 544 (emphasis in original). The judge may impose the upper term based on any "criteria reasonably related to the decision being made'" (apart from any fact that is an element of the crime). *Id.* at 538 (quoting Cal. Rule 4.408(a)). For these reasons, the California Supreme Court described California judges as exercising "the traditional broad range of judicial discretion." *Id.* at 544.

Nor is this construction of the statute a recent, post-*Blakely*, innovation. The California Supreme Court has long construed the State's sentencing system as, essentially, indeterminate. In *People v. Hernandez*, 757 P.2d 1013, 1019 (Cal. 1988), the court stated that "aggravating and mitigating circumstances assist a judge in selecting from among the options of punishment the trier of fact's verdict has made available. They help the sentencing court select, for example, the higher, middle, or lower term." The California Supreme Court therefore concluded that "[s]uch factors are largely the articulation of considerations sentencing judges have always used in making those decisions." *Id.*

This system is far removed from the genuinely determinate sentencing systems before the Court in *Blakely* and *Booker*, in which "facts selected by legislatures . . . not only authorized, or even mandated, heavier sentences than would otherwise have been imposed, but increased the range of sentences possible for the underlying crime." *Booker*, 543 U.S. at 236. As construed by the California Supreme Court, the California system does not specify judge-found facts that increase the sentencing range; it instead gives judges wide-ranging discretion to impose sentences they believe are reasonable in light of the policies underlying the statute.

To be sure, facets of the California system differ from the traditional indeterminate system addressed in *Williams*. As we have seen, however, the same is true in the post-*Booker* federal system. In particular, the following "non-traditional" attributes are common to both systems:

***In both systems, the trial judge's sentencing discretion is cabined by the requirement that sentences be "reasonable," as measured by the statutory policies.*** As discussed above, both the post-*Booker* federal system and the California system require that sentencing judges exercise their discretion in a "reasonable" manner, in light of policies set forth in the respective statutes. Even the policies themselves are similar in nature. The §3553(a) factors that guide the federal reasonableness determination refer not only to the prescribed offense levels, but also more generally to "the need for the sentence imposed . . . to promote respect for the law, and to provide just punishment for the offense; . . . to afford adequate deterrence to criminal conduct; [and] . . . to protect the public. . . ." Similarly, California's sentencing law seeks to promote punishment, proportionality, and uniformity. See Cal. Penal Code §1170(a)(1).

***In both systems, imposition of the middle term will typically be considered reasonable.*** Following *Booker*, six courts of appeal "have held that a sentence within the applicable guideline range is presumptively reasonable." *Final Report*, at 26. Moreover, as of March 2006, only one within-range sentence had been reversed as unreasonable, compared to seventeen reversals of sentences outside the applicable range. *Id.* at 31. A *de facto* presumption of reasonableness apparently exists in *every* circuit. Although there does not appear to be post-*Black* appellate case law in California on this issue, it seems likely that the same result will obtain there. Thus, in both California and the federal systems, imposition of the middle term/range is the safest course for sentencing judges, but they may exceed that term/range if they do so in the exercise of reasoned discretion.

***In both systems, the trial judge's reasons for sentencing a defendant at the top of the statutory range must be stated on the record.*** We noted earlier that the federal courts of appeal have required district courts to state their reasons for imposing above-range sentences, in order "to permit [the appeals] court to review the sentence for reasonableness as directed by *Booker*." *Mares*, 402 F.3d at 519. California judges, too, must state orally on the record their "reasons for selecting the upper or lower term," including the specific aggravating and mitigating facts. Cal. Rule 4.420(e). As in the federal system, this placement of reasons on the records enables appellate courts to review upward (or downward) departures for "reasonableness." See *Black*, 113 P.3d at 548.

In the end, notwithstanding the constraints placed on sentencing judges in the California and post-*Booker* federal systems, both systems are properly characterized as indeterminate. The critical common denominator is that both systems empower judges to sentence offenders anywhere in the statutory range based on the judges' discretionary judgment. To be sure, the Washington judge in *Blakely* and federal judges pre-*Booker* could exercise *some* discretion in deciding whether to depart upward. See *Blakely*, 542 U.S. at 305 n.8; United States Sentencing Guideline §5K2.0 ("The sentencing court *may* depart from the applicable guideline range if. . . .") (emphasis added). But their discretion only came into play after they engaged in trial-like factfinding "at the expense of the jury's traditional function of finding the facts essential to the lawful imposition of the penalty." *Blakely*, 542 U.S. at 309. The factfinding conducted by judges in California and the post-*Booker* federal system is of an entirely different nature, namely, to assist them in exercising their overarching

discretion to impose a reasonable sentence in light of the statutory goals.

It is immaterial that the California system, unlike the federal system, bars judges from considering facts that are elements of the crime (and hence already found by the jury) in deciding whether to impose the upper term. See Cal. Rule 4.420(c). The relevant issue is not what facts are taken *off* the table; the problem that prompted the *Apprendi* line of case was legislatures putting specific facts *on* the table and empowering judges to find them. Moreover, it is difficult to imagine a situation in which a federal court of appeals will hold that it was reasonable for a district court to depart upward based solely on facts that constituted elements of the crime. Judge Posner has observed that "the farther the judge's sentence departs from the guidelines sentence (in either direction – that of greater severity, or that of greater lenity), the more compelling the justification based on factors in section 3553(a) that the judge must offer." *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005). A jury's mere finding that the defendant committed the elements of the crime will rarely amount to a "compelling . . . justification" for an upward departure. Thus, in both systems the statutory maximum sentence will be imposed only (or virtually only) based on facts found by the sentencing court.

### B. The California sentencing system – like the post-*Booker* federal sentencing system – comports with *Blakely*.

Because judicial factfinding in indeterminate sentencing systems does not occur "at the expense of the jury's traditional function of finding the facts essential to the lawful imposition of the penalty," *Blakely*, 542 U.S. at 309,

it does not violate the Sixth Amendment right to a jury trial. California's sentencing system, as an indeterminate system, is therefore constitutional. This can be seen more clearly by applying to the California scheme the same analysis from *Blakely* that we earlier applied to the post-*Booker* federal scheme. See, *supra*, at 14-16.

The facts of this case provide a perfect template. Petitioner was convicted of continuous sexual abuse of a minor, for which the maximum punishment is 16 years imprisonment (not counting enhancements), but the presumptive, middle-term punishment is 12 years. The trial judge then sentenced Petitioner to 16 years based on his (not the jury's) findings that, among other things, (1) the crime was violent, vicious, and callous, (2) the victim was young and vulnerable, and (3) petitioner sought to coerce the victim to recant his statements about the crime.

As with the federal example provided earlier, although it is possible to argue that Petitioner had the legal *right* to the lesser sentence of 12 years, that view is mistaken. Petitioner is not *entitled* to no more than 12 years merely because the jury did not find the facts that formed the basis for the judge's upward departure. He knew he was risking a sentence of 16 years in jail for the offense when he committed it. Although he might have received a lesser sentence had his conduct been less reprehensible, that does not give the run-of-the-mine sexual predator in California an entitlement to the lesser sentence. The broad discretion the California sentencing system vests in the sentencing judge forecloses that result. See *Black*, 113 P.3d at 547 ("the judge has considerable discretion to select among the upper, middle, and lower terms").

By contrast, Petitioner *is* entitled to a sentence of no more than 16 years if he did not commit any of the specific facts that, if found by a jury beyond a reasonable doubt, authorize a sentence to be *enhanced* and thereby exceed the upper term. Those facts – which include use of a deadly weapon and the sale of particular quantities of drugs – "have a fixed and predictable sentencing consequence" (Berman, *supra*, at 16), which creates the sort of entitlement to which *Blakely* referred. The same cannot be said of facts found by California judges in the course of exercising their discretion as to which of the three terms to impose. See *Hernandez*, *supra*, 757 P.2d at 1018-20 (drawing precisely this line between statutory enhancements, on the one hand, aggravating and mitigating factors, on the other).

Finally, it bears responding to the following syllogism relied upon by Petitioner and his amici: (1) the California sentencing system is virtually identical to the Washington sentencing system at issue in *Blakely*; (2) this Court held in *Blakely* that the Washington sentencing system violated the Sixth Amendment; therefore (3) the California sentencing system, too, must violate the Sixth Amendment. See Pet. Br. 18-20; NACDL Br. 7. The problem with this syllogism is that its major premise is flawed. The California sentencing system, as construed by the California Supreme Court in *Black*, does not operate in the same manner as the Washington sentencing system this Court addressed in *Blakely*.

As an initial matter, the Washington sentencing system was "similar to the Federal Sentencing Guidelines," *Booker*, 543 U.S. at 231-32, establishing "presumptive sentencing ranges" based on "seriousness [of offense] levels" and "offender scores" applied to a sentencing grid.

Wash. Rev. Code §§9.94A.310-360 (1997). As in the federal system, judges could then depart upward or downward based on various factual findings made by the judge by a preponderance of the evidence. *Id.* §§9.94A.370 and 9.94A.390. The California sentencing system, as noted earlier, does not resemble the Federal Sentencing Guidelines.

More fundamentally, the Washington Supreme Court, unlike the California Supreme Court, never construed "the requirement that an aggravating factor exist" before the judge may sentence a defendant to the upper term as "merely a requirement that the decision to impose the upper term be *reasonable*." *Black*, 113 P.3d at 544. That makes all the difference. By construing the California statute in that way, the California Supreme Court effectively read the statute as authorizing indeterminate sentencing. In Washington, by contrast, a defendant was entitled to a sentence within the presumptive sentencing range unless the judge found facts that provided "substantial and compelling reasons justifying an exceptional sentence." *Id.* §§9.94A.120(1) and (2). A Washington judge's discretion to impose an "exceptional sentence" was, therefore, tightly confined. Whereas the middle term in California is merely a neutral point from which judges could freely go above or below based on their reasonable exercise of discretion, the presumptive sentencing range in Washington placed a huge thumb on the scale in favor of the guidelines range that could only be overcome by a judge's finding of compelling aggravating facts.[3] As a consequence,

[3] In 2003 and 2004, Washington judges imposed sentences above the presumptive sentencing range in a mere three percent of the cases. Washington State Sentencing Guidelines Comm'n, *Statistical Summary*

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the Washington sentencing scheme could only be described as determinate.

In the final analysis, equating the California sentencing system with the Washington system (for *Blakely* purposes) is as implausible as equating the pre-*Booker* federal system with the post-*Booker* federal system. The two systems have surface similarities but also fundamental distinctions that are outcome determinative. The California sentencing system satisfies *Blakely*'s dictates.

## III. A ruling that California's sentencing system violates the Sixth Amendment would have serious consequences for the states.

1. This Court has recognized that "[o]ur traditional deference to legislative policy choices finds a corollary in the principle that the Constitution does not mandate adoption of any one penological theory." *Ewing v. California*, 538 U.S. 11, 25 (2003) (internal quotation marks omitted). The wide variety of state sentencing systems attests to the vitality of that principle. Amicus NACDL nevertheless asserts that the Court should not hesitate to invalidate California's sentencing system because the State – and, presumably, any other State – "would find it easy to apply a *Blakely*-ized version of [its] sentencing system." NACDL Br. 24. Such reasoning cannot be squared with our Federalism. Choosing a place on the spectrum between a pure indeterminate sentencing system and pure determinate ("charge offense") sentencing system is a policy decision involving an array of tradeoffs

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*of Adult Felony Sentencing, Fiscal Year 2004*, at 22, *cited in Black*, 113 P.3d at 546 n.14.

that is for each State to make. If this Court were to hold that California's sentencing system violates the Sixth Amendment, every State would find that its ability to structure its criminal justice system as its citizens see fit has been diminished. That the option of *Blakely*-izing remains is utterly beside the point.

It is true, as the NACDL observes (Br. 15-20), that Kansas responded to *Apprendi* by requiring jury factfinding of aggravating factors, and that six other States responded to *Blakely* by doing likewise.[4] That observation, however, does not answer the pivotal questions of how well these *Blakely*-ized systems are working in practice, whether such a system would work as a practical matter in *other* States, and whether the legislatures of other States wish to make the same policy tradeoffs as the seven *Blakely*-ized States.

The dissents of Justices O'Connor and Breyer in *Blakely* set forth many of the practical problems that would attend requiring juries to find all aggravating factors beyond a reasonable doubt. Some facts relevant to sentencing – such as whether the defendant acts in an obstructive manner at trial – cannot be known in advance of the trial. *Blakely*, 542 U.S. at 319 (O'Connor, J., dissenting). Other facts relevant to sentencing – such as the character of the defendant – are not suitable for jury consideration. *Id.* at 318-19. And many defendants would be prejudiced were they forced to contest aggravating facts in the guilt phase of their trials. *Id.* at 334-35 (Breyer, J.,

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[4] See Alaska Stat. §12.55.155 (2006); Ariz. Rev. Stat. §13-702.02 (2006); Kan. Stat. Ann. §21-4716(b) (2005); Minn. Stat. §244.10 (2006); N.C. Gen. Stat. §15A-1340.10 (2006); Act of June 29, 2005, 2005 Oregon Laws 463 §§3(1), 4(1); Wash. Rev. Code §9.94A.537 (2006).

dissenting). Addressing these concerns by empanelling a second, sentencing jury "would be costly, both in money and in judicial time and resources." *Id.* at 336.

Another distinct concern with *Blakely*-ized systems is that they allow prosecutors to control the punishment by selecting which specific aggravating factors to charge. *Id.* at 334. An outgrowth of that increased prosecutorial power is a reduction in uniformity of punishment for the same *real* criminal conduct; uniformity will only be obtained with respect to the same *charged* conduct. *Id.* Yet tying "real punishment to real conduct" has been at the heart at sentencing reforms "[f]or more than a century." *Id.* at 339.

We do not know the extent to which these problems have surfaced in the seven *Blakely*-ized States. What we can infer is that the *Blakely* jury-factfinding model most naturally appeals to states that "will not have to make use of jury sentencing proceedings very often." Reitz, 105 Colum. L. Rev. at 1112. By contrast, the more complex a State's sentencing scheme, the more often juries would be required to find traditional sentencing facts, and the more often separate sentencing juries would have to be impaneled, the less appealing is the *Blakely* jury-factfinding model. As it turns out, more States presently have advisory guideline systems (*Booker*-ized systems) than have *Blakely*-ized systems.[5]

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[5] Nine States and the District of Columbia used advisory guideline systems prior to *Booker*. See Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 Fed. Sent'g Rep. 233, 239 n.2 (2005) (listing Arkansas, Delaware, the District of Columbia, Louisiana, Maryland, Missouri, Rhode Island, Utah, Virginia, and Wisconsin). Since *Booker*, Indiana and Tennessee amended their statutes to make their guidelines systems advisory. Ind. Code §35-50-2-1.3(a) (2006);

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In the end, it is for state legislatures to weigh the costs and benefits of the competing options and to select the one that best conforms to their respective penological and budgetary priorities. Some States will conclude that the costs of a *Blakely*-ized system are a small price to pay for reduced judicial discretion and an increased role for juries. Other States will decide they wish to place more power in the hands of judges or parole boards. And still other States will try to retain their determinate systems by increasing the top of their guideline ranges to the statutory maximums for each offense.[6] (California could similarly choose to make the upper terms the presumptive terms from which judges would have only the discretion to depart downward.) The genius of our constitutional design is its embrace of this diversity. See *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("the theory and utility of our federalism are revealed" when "the States may perform their roles as laboratories for experimentation to devise various solutions where the best solution is far from clear").

We are not suggesting, of course, that a State may enact a sentencing system that violates a constitutional proscription. But let there be no doubt that an overly-expansive reading of those proscriptions imposes serious costs to the States. And it is no answer to that objection to

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Tenn. Code Ann. §40-35-210(c) (2005). And two state Supreme Courts have concluded that *Booker* fixes are more suitable for their States than *Blakely* fixes. See *State v. Foster*, 845 N.E.2d 470 (Ohio 2006); *State v. Natale*, 878 A.2d 724 (N.J. 2005).

[6] See Frank Bowman, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with Blakely v. Washington*, 16 Fed. Sent. R. 364 (2004).

observe (as the NACDL does) that States retain the option of *Blakely*-izing.

2. Petitioner takes a slightly different tack, arguing that the California Supreme Court should have held that the California sentencing system violates *Blakely*, and then let the California Legislature cure the problem by, perhaps, adopting a *Booker*-like advisory system. Pet. Br. 28. This argument fails on several levels. As explained in Sections I and II, *supra*, the California Supreme Court's decision in *Black* has already construed the California sentencing system to operate in a manner very similar (if not identical) to *Booker*-ized systems. By reading "the requirement that an aggravating factor exist" before the judge may sentence a defendant to the upper term as "merely a requirement that the decision to impose the upper term be *reasonable*," *Black*, 113 P.3d at 544, the California Supreme Court construed the California sentencing law to be an indeterminate system. It would be the height of formalism to overturn that opinion on the ground that the court did not use the term "advisory."

It would likewise be the height of formalism to overturn the California Supreme Court's opinion on the ground that the court should have first held that the sentencing statute, as literally written, violates *Blakely*, and only then adopted its construction of the statute as a remedial fix. The California Supreme Court's construction of the State's sentencing system is definitive. See *Ring v. Arizona*, 536 U.S. 584, 603 (2002) ("the Arizona court's construction of the State's own law is authoritative"). It is not for petitioners, or this Court, to second guess how the court arrived at its construction. To be sure, the California Legislature – and state legislatures around the country – have the final word on how their respective sentencing

systems should be structured in the wake of *Blakely* and *Booker*. That is no reason, however, for particular judicial constructions or remedies of statutes to be rejected as inadequate, as Petitioner suggests.

## CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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